IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AFGHAN AND IRAQI ALLIES UNDER SERIOUS THREAT BECAUSE OF THEIR FAITHFUL SERVICE TO THE UNITED STATES, ON THEIR OWN AND ON BEHALF OF OTHERS SIMILARLY SITUATED, Plaintiffs, v. MICHAEL POMPEO, *et al.*, Defendants.	Civil Action No. 1:18-cv-01388-TSC

DEFENDANTS' NOTICE OF LODGING PROPOSED ADJUDICATION PLAN)

Defendants, through their undersigned counsel, file this notice of lodging for a Proposed Adjudication Plan in accordance with the Court's September 20, 2019 Order, ECF No. 76 (hereinafter "Proposed Adjudication Plan"). The submission of this Proposed Adjudication Plan does not alter Defendants' position stated in their prior pleadings to the Court and does not waive any rights of Defendants or future arguments with respect to hardship or feasibility.

Defendants respectfully disagree with the Court's finding "that Defendants' delays in the processing and adjudication of the SIV applications of the Plaintiffs and members of the Class are unreasonable in light of the Refugee Crisis in Iraq Act of 2007 ("RCIA") and the Afghan Allies Protection Act of 2009 ("AAPA")." Order (Sep. 20, 2019) at 1, ECF No. 76. Defendants maintain their position that neither the AAPA nor RCIA require the Department of Homeland Security and the Department of State (collectively, "Departments") to process Special Immigrant Visa ("SIV") cases from the beginning of the Chief of Mission ("COM") approval application process to a final visa adjudication within 9 months. The 9-month timeframe provided by

Congress is merely a reference point by which to measure whether the timing of the Departments' decision-making processes are reasonable to meet the competing priorities of: (a) providing a potential benefit to those aliens that have assisted the United States with the execution of its foreign policy aims; and (b) ensuring aliens who pose a threat to the United States not be permitted to obtain a visa. Moreover, Defendants respectfully aver that the 9-month timeline applies exclusively to the visa adjudication process, *i.e.*, it applies to those steps the government takes *after* a potential SIV applicant has established that he or she is an "eligible alien" defined under the AAPA and RCIA by the successful completion of the COM approval process and U.S. Citizenship and Immigration Services ("USCIS") petition approval. Nevertheless, in compliance with the Court's September 20, 2019 Order, Defendants submit this Proposed Adjudication Plan (attached hereto as Exhibit A) premised on the Court's conclusion that Congress requires the Secretary of Homeland Security and the Secretary of State to complete all government controlled steps within 9 months after an alien submits an application for COM Approval, *see* Mem. & Op. (Sep. 20, 2019) at 9–13, ECF No. 75, and its direction to promptly process and adjudicate class members "whose applications have been awaiting government action for longer than 9 months." Order (Feb. 5, 2020) at 1, ECF No. 89.

Defendants intend to seek a meet and confer with Plaintiffs to discuss any objections they may have to the Proposed Adjudication Plan and attempt to resolve those objections prior to the deadline for Plaintiffs to submit objections.

Ongoing Efforts to Promptly Process and Adjudicate SIV Applications

The U.S. government has devoted significant resources to reducing the amount of time required to complete the SIV process, and Defendants closely monitor processing and strive to make improvements to the COM, petition, and visa application processes whenever warranted.

In addition, as Defendants have discussed in prior filings, pursuant to section 7076 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019, Pub. L. 116-6, 133 Stat. 267, 391 (FY 2019 Appropriations Act), the Department has already implemented and will continue to implement a special immigrant visa prioritization plan ("Prioritization Plan") to give priority to certain aliens who are seeking visas in a category that is numerically limited by Congress, based on the nature of work they performed. Under the Prioritization Plan, as outlined in the Foreign Affairs Manual, Afghans seeking visas under the AAPA will be prioritized in the following order:

> (a) Interpreters and Translators: Afghans working with U.S. military and U.S. government personnel as interpreters or translators, with extra consideration for those who assisted in combat operations.
>
> (b) U.S. Government Direct Hire Employees: Afghan locally employed staff under personal services agreement or personal services contract for the Department, DOD, or other U.S. government agencies. This also includes direct hire employees of International Security Assistance Force (ISAF) or Resolute Support (RS), NATO, and governments participating in ISAF or RS in Afghanistan.
>
> (c) Contractors with U.S. Government Installation Badges: Afghan third party contractors or subcontractors employed on behalf of the U.S. government working at a U.S. government installation in Afghanistan. This includes employees of companies that provide on-compound support for the U.S. Embassy, DOD, or other U.S. government installation.
>
> (d) Implementing Partners (IP): Afghan third party contractors or subcontractors employed on behalf of U.S. government entities, such as USAID and INL, implementing instructions in the field in Afghanistan.
>
> (e) All Other Applicants: Afghan U.S. government contractors, logistics or transportation service providers, and companies contracted by the U.S. government to provide services to Afghan National Army or Afghan National Police installations.

Foreign Affairs Manual, 9 FAM 502.5-12(B)(b)(9). To the extent that the congressionally-required Prioritization Plan conflicts with the Proposed Adjudication Plan, Defendants may seek relief from the Court or seek that the Court reconsider its prior order of class certification.

Resource Constraints Relevant to the Proposed Adjudication Plan

Defendants' ability to implement additional changes that could hasten the COM approval process and the SIV visa adjudication process would be subject to the availability of resources at the Department of State, such as funding and staffing. Unlike other visa applicants, SIV applicants do not pay fees associated with an application. *See, e.g.,* AAPA § (b)(4)(C) ("The Secretary of Homeland Security or the Secretary of State may not charge an alien . . . any fee in connection with an application for, or issuance of, a special immigrant visa under this section."). Absent additional staffing and resources, the Department of State is severely restricted in the actions it can take to accelerate either the COM approval process or the SIV visa adjudication process. The Department of State's operational capabilities will likely be further strained by the submission of potentially thousands of additional Afghan SIV applications following recent amendments to the AAPA that revised the eligibility criteria for the Afghan SIV program. *See infra* (describing the change to AAPA § 602(b)(A)). The steps outlined in the Proposed Adjudication Plan are therefore focused on those actions that the Department of State would be able to implement with current resources and under current caseload levels.

USCIS currently has staffing resources to meet its target timeframe of 30 days to adjudicate a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. *See* Supp. to Opp. to Mot. for Prelim. Inj. at 13 (noting that "the adjudication of a Form I-360 normally moves in due course" and that the target timeline for adjudication is 30 days).

Risk of Conflict With Congressional Intent

Defendants note that the actions required to complete the COM Approval process, the petition approval process, and the visa adjudication process within 9 months may be at odds with Congress's intent to allow aliens ample opportunity to satisfy the SIV program requirements.

See, e.g., AAPA § 602(b)(4)(D)(II) (requiring "that every applicant is provided a reasonable opportunity to provide additional information, clarify existing information, or explain any unfavorable information"). In particular, Defendants' current processes to adjudicate these applications impose no deadlines or timeliness restrictions on an alien's efforts to meet the requirements, such that an alien's file may remain open for an indefinite amount of time to allow the alien to provide further information in support of his or her application. If Defendants are required to adhere to a specific decision-making timeframe, they will lose the ability to provide the currently available opportunities for aliens to be able to demonstrate that they have met their burden of proving that they qualify for SIVs, and thousands of applications that have not yet met the requirements will be denied and/or terminated as incomplete. In effect, Defendants would be forced to shut the door on potential SIV applicants instead of maintaining the open-ended opportunities for them to attempt to qualify for an SIV.

Defendants wish to preserve a process that maximizes an alien's opportunity to establish eligibility for an SIV. Accordingly, in developing a potential adjudication plan, Defendants sought to identify actions to improve the efficiency and, thus, reduce the time necessary to process and adjudicate an application that do not diminish or quash an alien's opportunity to establish eligibility. However, those ideas were not incorporated into the Proposed Adjudication Plan to the extent that the implementation of such ideas would require significant additional resources from the Department of State.

Therefore, the Proposed Adjudication Plan identifies actions that may be taken based on existing funding and staffing levels and relies on the assumption that existing funding and staffing levels will continue as well as actions that may be taken within the 9-month processing timeframe. Many of the proposed actions will, in contravention of Defendants' current

approach, restrict opportunities for an alien to establish eligibility for and ultimately be issued an immigrant visa under the AAPA or the RCIA, or will otherwise risk negatively impacting aliens and their families.

Moreover, Defendants underscore that the Department of State's ability to implement the Proposed Adjudication Plan will remain dependent on and may be affected by a number of factors, including the availability of visa numbers, the availability of resources, future legislative changes to the Afghan and Iraqi SIV programs, and the ability of Department of State consular sections overseas to continue to function without interruption or closure due to unforeseen circumstances such as war, civil unrest, or pandemics.

Recent Congressional Action

Defendants further note that since the Court issued its order, Congress, in the National Defense Authorization Act for Fiscal Year 2020 ("FY2020 NDAA"), directed the Office of the Inspector General of the Department of State to submit a report "to evaluate the obstacles to effective protection of Afghan and Iraqi allies through the special immigrant visa programs and suggestions for improvements in future programs" to the "Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Armed Services of the Senate; and . . . the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Armed Services of the House of Representatives." FY2020 National Defense Authorization Act, Pub. L. 116-92, § 1215(a), (b) (Dec. 20, 2019). As noted in prior pleadings, the Department of State continuously works with Congress to ensure the viability of the SIV programs under the AAPA and RCIA, *see*, *e.g.*, Supp. to Opp. to Mot. for Prelim. Inj., ECF No. 70, at 33 (noting the Department of State working to ensure that Congress allocated sufficient visa numbers under the AAPA), and Congress has indeed exercised continuous and active oversight to ensure that the

Secretary of State and Secretary of Homeland Security are meeting congressional intent as to the RCIA and AAPA, *see*, *id.* at 30–34 (discussing congressional oversight). Congress may implement further modifications to the RCIA and the AAPA which may require Defendants to seek relief from the Court from any approved adjudication plan should an approved plan conflict with any future statutory changes.

Defendants also note that in the FY2020 NDAA, Congress revised the AAPA's definition of "principal alien." Prior to the FY2020 NDAA, section 602(b)(2)(A) read:

> (2) Aliens described.-
>
> (A) Principal aliens.-An alien is described in this subparagraph if the alien-
>
> (i) is a citizen or national of Afghanistan;
>
> (ii) was or is employed in Afghanistan on or after October 7, 2001, for not less than 1 year, or, if submitting a petition after September 30, 2015, for a period of not less than 2 years-
>
> (aa) by, or on behalf of, the United States Government, in the case of an alien submitting an application for Chief of Mission approval pursuant to subparagraph (D) before the date of the enactment of the National Defense Authorization Act for Fiscal Year 2017 [Dec. 23, 2016]; or
>
> (bb) by, or on behalf of, the United States Government, in the case of an alien submitting an application for Chief of Mission approval pursuant to subparagraph (D) on or after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2017, which employment required the alien-
>
> (AA) to serve as an interpreter or translator for personnel of the Department of State or the United States Agency for International Development in Afghanistan, particularly while traveling away from United States embassies or consulates with such personnel;
>
> (BB) to serve as an interpreter or translator for United States military personnel in Afghanistan, particularly while traveling off-base with such personnel; or
>
> (CC) to perform sensitive and trusted activities for the United States Government in Afghanistan; or . . .

FY2017 National Defense Authorization Act, Pub. L. 11-328, § 1214, 130 Stat. 2479 (Dec. 23, 2016). Section 602(b)(2)(A)(ii) now reads:

> (2) Aliens described.-
>
> (A) Principal aliens.-An alien is described in this subparagraph if the alien-
>
> (i) is a citizen or national of Afghanistan;
>
> (ii) was or is employed in Afghanistan on or after October 7, 2001, for not less than 1 year, or, if submitting a petition after September 30, 2015, for a period of not less than 2 years-by, or on behalf of, the United States Government; or . . .

Pub. L. 116-92, § 1215(a).

Identification of Class Members

On February 5, 2020, the Court certified a class. Order (Feb. 5, 2020), ECF No. 89. The Court defined the class as:

> all people who have (1) applied for an Afghan or Iraqi SIV pursuant to the Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, 123 Stat. 807 ("AAPA"), or the Refugee Crisis in Iraq Act of 2007, Pub. L. No. 110-181, 122 Stat. 395 ("RCIA"), by submitting an application for Chief of Mission ("COM") approval, and (2) whose applications have been awaiting government action for longer than 9 months.

Id. at 1. Accordingly, using the same 14 steps currently utilized by Defendants in their quarterly reports to Congress, *see*, e.g., Mot. to Dismiss at 14–16, ECF No. 30 (describing the 14 steps), Defendants will identify class members by identifying any alien that has been awaiting government action in a government-controlled step for longer than 9 months as of the date of the Court's order, certifying a class, Order (Feb. 5, 2020). The government-controlled steps are Step 2 ("[the Department of State's National Visa Center ("NVC")] reviews documents for completeness"), Step 4 ("the COM Committee reviews the application and makes a decision to

approve or deny"), Step 7 ("USCIS adjudicates petition and sends to NVC if approved")[1], and Step 13 (The applicant's case undergoes administrative processing"). For the remaining steps, Defendants aver that aliens in those steps are not part of the class because Defendants currently complete the processing of the application in Steps 3, 5, 8, 10, and 12 in less than 10 days; the Department of State must work with the applicant to complete Step 11[2]; or in Steps 1, 6, 9, and 14 the applicant controls the step.

[1] Defendants note that USCIS has identified two current eligible class members and, as described in the adjudications plan, has proposed limiting a class member's opportunity to establish eligibility when a case has been pending longer than 9 months.

[2] In Step 11, the NVC schedules the applicant for the next available interview at the U.S. embassy's consular section. As noted in prior pleadings, the Department of State "must provide time for the applicant and his or her derivative beneficiaries to make arrangements for and to travel to the interview." Supp. to Opp. to Mot. for Prelim. Inj. at 70. Moreover, Defendants have reduced the time to complete Step 12 for applicants under the AAPA. *See* Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program (July 2019) at 3 (noting 27 days to schedule an interview) and (Oct. 2019) at 3 (noting 11 days to schedule an interview). Lastly, the interview may need to occur outside of Iraq or Afghanistan, which further demonstrates that the scheduling of an interview must account for an applicant's input. *See, e.g.,* U.S. Embassy & Consulates in Iraq, Visas (noting that "[a]s of January 1, 2020, all consular services are suspended at U.S. Embassy Baghdad" and reassigning all immigrant visa applications to "U.S. Embassies Ankara, Abu Dhabi, or Doha" or allowing applicants to transfer their application to "a different U.S. embassy or consulate other than those in Ankara, Abu Dhabi, and Doha."), available at https://iq.usembassy.gov/visas/ (last visited Mar. 5, 2020).

Date: March 5, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

WILLIAM C. PEACHEY
Director, District Court Section

ANTHONY D. BIANCO
Senior Litigation Counsel
District Court Section

/s/ Joseph F. Carilli, Jr.
JOSEPH F. CARILLI, JR.
N.H. Bar Identification No. 15311
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-4848
E-mail: joseph.f.carilli2@usdoj.gov

WILLIAM M. MARTIN
Trial Attorney

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Joseph F. Carilli, Jr.
JOSEPH F. CARILLI, JR.
N.H. Bar Identification No. 15311
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-4848
E-mail: joseph.f.carilli2@usdoj.gov

Attorney for Defendants

Exhibit A

PROPOSED ADJUDICATION PLAN

Subject to the Defendants' objections and comments set forth in the Notice of Lodging filed with this exhibit, Defendants propose the actions below to improve the Department of State's ("Department") processing times for COM Approval applications and visa applications for the Afghan and Iraqi Special Immigrant Visa ("SIV") programs and the U.S. Citizenship and Immigration Services ("USCIS") processing of I-360 petitions.

- **Process principal aliens before derivative aliens** – In addition to implementing the Prioritization Plan that the Department prepared pursuant to section 7076 of the Department, Foreign Operations and Related Programs Appropriations Act, 2019 (Div. F, P.L. 116-6), the Department will process the SIV cases of principal aliens before processing derivative aliens. This will allow the Department to avoid allocating already-stretched staffing and resources to processing derivatives whose cases ultimately may not move forward because the principal alien is denied at either the COM Approval or visa application stage. This will also allow the Department to ensure that the best possible chance has been provided for aliens to use all of the allocated visa numbers during any given fiscal year.
- **Impose a deadline for submitting required documents for COM Approval application –** For the existing backlog of more than 8,000 documentarily incomplete COM Approval applications, the Department will impose a 30-day time limit for aliens to provide a full and complete submission of all required documents to the National Visa Center ("NVC").[1] If NVC does not receive all required documentation for a COM Approval application in full within 30 days, then NVC will mark the case as incomplete and notify the applicant the case is closed. This will allow the Department to complete processing for currently incomplete applications and reallocate its time to moving forward the applications of those aliens who have indicated interest in pursuing an SIV by providing all of the required documentation.
- **Impose a deadline for COM Committee verification of documents** – If the COM Committee determines that independent verification of documentation provided for the application is required (for example, the recommendation letter and verification of employment from an employer), then the party furnishing such documentation will be subject to a 30-day timeline to respond to the request for verification. If the COM Committee does not receive verification within 30 days, the COM application will be denied. This will allow the COM Committee to complete processing of COM Approval applications in a more timely manner.
- **Limit repeat COM applications –** Under the Afghan Allies Protection Act of 2009 and the Refugee Crisis in Iraq Act of 2007, a COM applicant whose COM application is denied is given one opportunity to appeal within 120 days of the denial notice being issued. Moving forward, COM applicants who have a previously-denied appeal may

[1] A list of required documents for the COM Approval application is available at https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html.

only submit a new COM application when there is new qualifying employment being presented for consideration. By disallowing repeat submissions from a COM applicant who has had no substantive change in the facts in his or her case, this will free up the Department's resources to allow reallocation of time to processing COM applications from persons whose submissions have not yet been considered.

- **Impose a deadline for adjudication of the Form I-360 Petition** – If the Department of Homeland Security, USCIS, Nebraska Service Center identifies any Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, pending longer than 9 months, a senior adjudicator will review the case to determine whether the applicant should be afforded a final opportunity to demonstrate eligibility. If the senior adjudicator determines in the exercise of discretion that the alien should be provided a final opportunity to demonstrate eligibility, USCIS will serve a final Form N-14, Request for Evidence, or other appropriate request on the applicant and provide the applicant an additional 30 days to demonstrate eligibility before issuing a Notice of Intent to Deny.
- **Schedule visa application interviews worldwide** – If the consular section with jurisdiction over the alien is not open due to war, civil unrest, or other circumstances, or does not have sufficient capacity to process a visa application within the requisite timeframe, the case will be scheduled at another location to ensure such processing is not impeded. The Department may assign interview appointment dates and times at any U.S. Embassy or Consulate worldwide, so long as the host government has admitted or will give permission to admit that citizen of Afghanistan and/or Iraq. This will allow the Department to continue processing visa applications despite resource, staffing, or other limitations – many of which are out of the Department's control – at certain consular sections.
- **Terminate abandoned visa applications** – The Department will, pursuant to INA Section 203(g), terminate the visa application of any applicant who has failed to appear for his or her scheduled visa interview and fails to reschedule the interview within one year, or who, having been refused a visa for missing documentation, has failed to respond to the Department's request for such documentation within one year. This will allow the Department to complete processing for visa applications wherein it appears that the applicant has abandoned the case.